Kerajaan Malaysia v Ong Kar Beau

HIGH COURT (SHAH ALAM) — SUIT NO MT3-21-26 OF 1997
ZALEHA ZAHARI J
4 APRIL 2003

Civil Procedure *— Summary judgment — Income tax — Summary judgment entered against tax-payer for assessed tax and penalties due and payable under notice of assessment — Tax subsequently reduced by notice of reduced assessment on appeal to special commissioners — Whether summary judgment may be varied to reflect reduced tax*

Revenue Law *— Income tax — Payment of tax pending dispute — Whether upon service of a notice of assessment tax assessed therein becomes due and payable — Whether such tax due and payable notwithstanding disputes or appeals against such assessment*

Revenue Law *— Income tax — Recovery by government of taxes due and payable — Whether assessed tax and penalties imposed may be recovered by way of civil proceedings as a debt due to the Government — Whether court may entertain any plea that amount of tax sought to be recovered excessive, incorrectly assessed, under appeal, or incorrectly increased — Whether tax assessed payable notwithstanding any appeal against the assessment*

Revenue Law *— Income tax — Recovery by government of taxes due and payable — Summary judgment entered against tax-payer for assessed tax and penalties due and payable under notice of assessment — Tax subsequently reduced by notice of reduced assessment on appeal to special commissioners — Whether summary judgment may be varied to reflect reduced tax*

By a notice of assessment dated 5 April 1996 posted to the defendant's last known address, the plaintiff informed the defendant of tax due and payable by him. Due to the defendant's failure and continued failure to pay up, the plaintiff imposed penalties. The plaintiff subsequently filed a writ and statement of claim on 31 January 1997 against the defendant claiming the tax due and payable by the defendant together with the penalties imposed. By an application filed on 2 May 1998, the plaintiff sought to enter summary judgment against the defendant. The defendant denied receiving the notice of assessment and disputed the plaintiff's assessment and penalties imposed. He lodged an appeal pursuant to s 99 of the Income Tax Act 1967 ('the Act') to the Special Commissioners of Income Tax. The plaintiff argued that the tax and penalties claimed were payable notwithstanding the defendant's appeal. The plaintiff further submitted that the challenge raised by the defendant that the tax was excessive and incorrectly assessed was no reason for the High Court not to enter summary judgment against the defendant. The senior assistant registrar ('SAR') allowed the plaintiff's application for summary judgment on 31 July 1998. The defendant filed this appeal against the SAR's decision to the High Court judge. At the end of the appeal, the plaintiff informed the High Court that the defendant's appeal to the special commissioners had been disposed of and that the plaintiff had issued a notice of reduced assessment reducing the tax

and penalties payable by the defendant. The defendant's response was that it was incumbent upon the plaintiff to file a fresh action against him and issue a fresh s 142(1) certificate. The defendant also appealed against the decision of the special commissioners by way of case stated to the High Court.

Held, dismissing the defendant's appeal (against the summary judgment) with costs:

(1) The scheme of the Income Tax legislation is clear. Upon service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable at the place specified in the notice, whether or not that person appeals against the assessment. Failure to pay within the time prescribed would attract the provisions of the penalties provided for under ss 103(4) and 103(5A) of the Act. The amount assessed and the penalty imposed may be recovered by way of civil proceedings as a debt due to the Government (See p 229H–I).

(2) When civil proceedings are brought by the Government to recover tax assessed, the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal, or incorrectly increased (see p 230A); *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 followed. Thus on the facts, the SAR was right in deciding that there was no issue to be tried and in allowing the application for summary judgment on 31 July 1998 in the amount claimed by the plaintiff in its statement of claim (see p 230B).

(3) The defendant was appealing against the decision of the special commissioners and the appeal was by way of case stated to the High Court. The High Court sitting on appeal against the decision of the special commissioners by way of case stated is clearly the proper forum to hear the defendant's challenges of the assessed tax. Pending disposal of the appeal, the relevant provisions of the Act imposed upon the defendant the obligation to pay the tax notwithstanding any such appeal. However, in the interest of justice, as the tax assessed had been reduced pursuant to the plaintiff's notice of reduced assessment, the judgment entered against the defendant was to be varied to correspond with the sum stipulated in the notice of reduced assessment (see pp 230G–H, 231A).

[Bahasa Malaysia summary

Melalui satu notis taksiran bertarikh 5 April 1996 yang telah diposkan kepada alamat terakhir defendan yang diketahui, plaintif telah memaklumkan kepada defendan cukai yang tertunggak dan perlu dibayar oleh beliau. Oleh kerana kegagalan defendan dan kegagalan berterusan untuk membayar, plaintif telah dikenakan penalti-penalti.

Plaintif kemudian telah memfailkan satu writ dan pernyataan tuntutan pada 31 Januari 1997 terhadap defendan menuntut cukai tertunggak dan perlu dibayar oleh defendan bersama dengan penalti-penalti yang dikenakan. Melalui satu permohonan yang difailkan pada 2 Mei 1998, plaintif memohon untuk memasuki penghakiman terus terhadap defendan. Defendan menafikan telah menerima notis taksiran dan mempertikaikan taksiran dan penalti-penalti yang dikenakan oleh plaintif. Beliau telah membuat rayuan menurut s 99 Akta Cukai Pendapatan 1967 ('Akta tersebut') kepada Pesuruhjaya Khas Cukai Pendapatan. Plaintif telah berhujah bahawa cukai dan penalti-penalti yang dituntut perlu dibayar meskipun terdapat rayuan defendan. Plaintif seterusnya berhujah bahawa cabaran yang ditimbulkan oleh defendan bahawa cukai tersebut terlalu tinggi dan disalahtaksirkan bukan sebab untuk Mahkamah Tinggi untuk tidak memasuki penghakiman terus terhadap defendan. Penolong kanan pendaftar ('PKP') telah membenarkan permohonan plaintif untuk penghakiman terus pada 31 Julai 1998. Defendan telah memfailkan rayuan ini terhadap keputusan PKP kepada hakim Mahkamah Tinggi. Di akhir rayuan tersebut, plaintif telah memaklumkan Mahkamah Tinggi bahawa rayuan defendan kepada pesuruhjaya khas telah selesai dan plaintif telah mengeluarkan satu notis untuk pengurangan taksiran untuk mengurangkan cukai dan penalti-penalti yang perlu dibayar oleh defendan. Jawapan defendan adalah bahawa ia adalah kewajipan plaintif untuk memfailkan satu tindakan baru terhadap keputusan pesuruhjaya khas melalui kes yang dinyatakan kepada Mahkamah Tinggi.

Diputuskan, menolak rayuan defendan (terhadap penghakiman terus) dengan kos:

(1) Skima perundangan Cukai Pendapatan adalah jelas. Setelah penyampaian satu notis taksiran ke atas seseorang ditaksirkan, cukai yang kena dibayar di bawah taksiran tertunggak dan perlu dibayar di tempat yang ditetapkan dalam notis tersebut, sama ada atau tidak seseorang itu merayu terhadap taksiran tersebut. Kegagalan untuk membayar dalam tempoh yang ditetapkan akan melibatkan peruntukan penalti yang diperuntukan di bawah ss 103(4) dan 103(5A) Akta tersebut. Jumlah yang ditaksirkan dan penalti yang dikenakan boleh dikembalikan melalui prosiding sivil sebagai hutang tertunggak kepada Kerajaan (lihat ms 229H–I).

(2) Apabila prosiding sivil dimulakan oleh Kerajaan untuk mendapat balik cukai yang ditaksirkan, mahkamah tiada kuasa untuk melayan apa-apa pli bahwaa jumlah cukai yang dipohon untuk dikembalikan adalah terlalu tinggi, disalahtaksirkan, di bawah rayuan, atau ditambah secara salah (lihat ms 230A); *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 diikut. Oleh itu berdasarkan fakta-fakta, PKP adalah betul dalam memutuskan bahawa tiada persoalan untuk dibicarakan dan

dalam membenarkan permohonan untuk penghakiman terus pada 31 Julai 1998 bagi jumlah yang dituntut oleh plaintif dalam pernyataan tuntutannya (lihat ms 230B).

(3) Defendan telah merayu terhadap keputusan pesuruhjaya khas dan rayuan tersebut adalah melalui kes yang dinyatakan kepada Mahkamah Tinggi. Mahkamah Tinggi yang bersidang untuk rayuan terhadap keputusan pesuruhjaya khas melaui kes yang dinyatakan adalah dengan nyata forum yang betul untuk mendengar cabaran-cabaran defendan untuk menaksir cukai. Sementara menunggu rayuan selesai, peruntukan relevan Akta tersebut mengenakan ke atas defendan obligasi untuk membayar cukai meskipun terdapat rayuan. Namun begitu, demi kepentingan keadilan, oleh kerana cukai yang ditaksirkan telah dikurangkan menurut notis ppengurangan taksiran plaintif, penghakiman yang dimasuki terhadap defendan perlu dibezakan untuk pengurangan jumlah yang ditetapkan dalam notis pengurangan taksiran tersebut (lihat ms 230G–H, 231A).]

Notes

For cases on income tax, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5962–5965.

For cases on payments of tax pending dispute, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2111–2115.

For cases on recoveries by government of taxes due and payable, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) para 2131.

Cases referred to

Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163 (folld)

Legislation referred to

Income Tax Act 1967 ss 99, 103(4), (5A), 106(1), 142(1), (2)(c)

Hazlinda Hussein (Legal Officer, Inland Revenue Dept) for the plaintiff.
Paul Kwong (*Azman Davidson & Co*) for the defendant.

Zaleha Zahari J: By writ and statement of claim filed on 31 January 1997 the plaintiff claimed that the defendant was justly and truly indebted in the sum of RM155,502.02 to the plaintiff being income tax raised and penalties imposed for year of assessment 1994.

Vide summons in chambers filed on 2 May 1998 (encl (12)) the plaintiff sought to enter summary judgment against the defendant in the amount claimed contending that there were no issues to be tried. The plaintiff claimed that they were entitled to judgment in the sum assessed pursuant to a certificate dated 14 February 1998 (ie exh 'TS4', encl (11) under s 142(1) of the Income Tax Act 1967 ('the Act') and that such a

certificate was sufficient evidence of the amount so due and sufficient authority for this court to give judgement for that amount against the defendant.

According to the plaintiff the notice of assessment dated 5 April 1996 (exh 'TS1', encl (11)) had been duly posted to the defendant's last known address and is accordingly deemed to have been served on the defendant pursuant to s 145(2)(c) of the Act.

Upon the defendant's failure to pay within 30 days from date of service of the notice of assessment a sum of RM134,675.50 representing 10% of the tax payable was imposed as penalty pursuant to s 103(4) of the Act. Subsequently, upon the defendant's continued failure to pay the tax payable, a further penalty of 5% in the sum of RM74,071.52 was imposed pursuant to s 103(5A) of the Act. The plaintiff s case is that the penalty imposed is payable as tax due and payable by way of civil suit pursuant to s 106(1) of the Act.The tax payable to the plaintiff for year of assessment 1994 by the defendant at the time of filing of this suit case was accordingly as follows:

Tax for Year of Assessment 1994	RM1,346,755.00
10% Penalty	RM 134,675.50
	RM1,481,430.50
5 % Penalty	RM 74,071.52
	RM1,555,502.02

With respect to the pending appeal lodged by the defendant against the assessment raised to the Special Commissioners of Income Tax by which appeal the defendant challenged and disputed the amount of tax sought to be recovered, the plaintiffs case is that the amount claimed is payable notwithstanding the lodgement of that appeal. That the challenge by the defendant that the tax raised was excessive, incorrectly assessed, was no reason for this court not to enter summary judgment against the defendant.

In his statement of defence, as well as in his affidavit in reply resisting the plaintiff's application for summary judgment, the defendant took issue with the assessment and penalty imposed. The defendant denied receiving the notice of assessment issued. He also held out the fact that an appeal which he lodged pursuant to s 99 of the Act in respect of the notice of assessment in issue was pending before the Special Commissioners of Income Tax.

My decision are as follows. The scheme of the Income Tax legislation is clearly that, upon service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable at the place specified in the notice, whether or not that person appeals against the assessment. Failure to pay within the time prescribed would attract the provisions of the penalties provided for under ss 103(4) and 103(5A) of the Act. The amount assessed and penalty imposed can be recovered by way of civil proceedings as a debt due to the government.

The courts have consistently held, of which *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 is but one of a string of cases, that when civil proceedings are brought by the government to recover tax assessed, the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal, or incorrectly increased.

In these circumstances I accordingly hold that senior assistant registrar ('SAR') was right in making the decision that she did in holding that there was no issue to be tried and in allowing the application for summary judgment on 31 July 1998 in the amount claimed by the plaintiff in its statement of claim.

Be that as it may, at the end of hearing of this appeal against the learned SAR's decision, the court took note of the fact in the plaintiff's supplementary affidavit affirmed on 20 August 2002 (encl (28)) the defendant's appeal had been disposed of by the special commissioners vide deciding order dated 9 June 2000 (exh KM-1, encl (28)). According to this deciding order the special commissioners had varied the amount of commission chargeable to tax from RM4,000,000 to RM3,770,000, arising from which decision the plaintiff has subsequently issued a notice of reduced assessment dated 27 June 2002 (exh 'KM2', encl (28)) consistent with the said decision. The plaintiff has also correspondingly reduced the penalties imposed.

According to the plaintiff the sum of tax payable by the defendant pursuant to this development has accordingly been reduced as follows:

Tax for Year of Assessment 1994	RM 1,268,555.00
10% Penalty 5% Penalty	RM 196,626.02
	RM 1,465,181.02

The defendant's response to this development was that it was incumbent upon the plaintiff to file a fresh action against him, and issue a fresh s 142(1) certificate. That in this situation this court should accordingly allow his appeal.

I hold otherwise. I am of the view that the course of action advocated by the defendant is not consistent with the scheme of the Income Tax legislation. From the deciding order, the court took note of the fact that the defendant is now appealing against the special commissioner decision, and that the appeal is by, way of case stated to the High Court.

The High Court sitting on appeal against the decision of the special commissioners by way of case stated is clearly the proper forum to hear the challenge by the defendant of the tax assessed. Pending the disposal of the defendant's appeal by the High Court by way of case stated the relevant provisions of the Act imposes upon the defendant the obligation to pay the tax notwithstanding any such appeal.

Be that as it may, in the interest of justice, I am of the view that regard could be taken of the circumstance at the time of decision of this appeal.

A As the tax raised in this case has since been reduced pursuant to the notice of reduced assessment issued by the plaintiff on 27 June 2002, the judgment entered against the defendant is varied to correspond with the sum stipulated in the notice of reduced assessment.

To sum up, the defendant's appeal was dismissed with costs. Summary judgment is entered against the defendant in the sum of RM1,465,181. The orders relating to interest and costs of the SAR was affirmed.

Defendant's appeal against summary judgment dismissed. Summary judgment varied to correspond with reduced sum in notice of reduced assessment.

Reported by Andrew Christopher Simon